IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

JUDAH H. WHITMORE, INDIVIDUALLY AND AS NEXT FRIEND OF RONALD GENE SIMMONS ..... *Petitioner*

vs.

STATE OF ARKANSAS ..... *Respondent*

RONALD GENE SIMMONS, SR. ..... *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT THE STATE OF ARKANSAS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED ... 2

STATEMENT OF THE CASE 3

SUMMARY OF THE ARGUMENT 8

ARGUMENT 11

I. Whether the Eighth Amendment's ban against cruel and unusual punishment requires mandatory appellate review in all cases in which the death penalty is imposed.

II. Whether petitioner Whitmore has standing to assert the constitutional rights of the genuine party at interest, Ronald Gene Simmons, after Simmons has made a knowing and intelligent decision to waive assertion of his own rights.

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES:

Allen v. Wright, 468 U.S. 737 (1984) 20

Booth v. Maryland, 482 U.S. 496 (1987) 11

California v. Brown, 479 U.S. 538 (1987) 11

Caplin and Drysdale v. United States, 109 S. Ct. 2646 (1989) 20

Coker v. Georgia, 433 U.S. 584 (1977) 18

Collins v. State, 261 Ark. 195, 548 S.W.2d 106, *cert. denied*, 434 U.S. 878, *reh. denied*, 434 U.S. 977 (1977) 9

Ford v. Wainwright, 477 U.S. 399 (1986) 18

Franklin v. Lynaugh, 108 S. Ct. 2320 (1988) 11

Franz v. Lockhart, 700 F.Supp. 1005 (E.D. Ark. 1988) 5

Franz v. State, 296 Ark. 111, 751 S.W.2d 355 (1988) 5

Franz v. State, 296 Ark. 181, 754 S.W.2d 839 (1988) 5

Fretwell v. State, 289 Ark. 91, 708 S.W.2d 630 (1986) 15

Furman v. Georgia, 408 U.S. 238 (1972) 17

Gilmore v. Utah, 429 U.S. 102 (1976) 14

Gregg v. Georgia, 428 U.S. 153, 195 (1976) 8

Johnson v. Mississippi, 108 S. Ct. 1981 (1988).....12

Jurek v. Texas, 428 U.S. 262 (1976) 13

Lockett v. Ohio, 438 U.S. 586 (1978) 12

Page

Maynard v. Cartwright, 108 S. Ct. 1853 (1988) 11

McCleskey v. Kemp, 481 U.S. 279 (1987) 13

Murray v. Giarratano, 109 S. Ct. 2765 (1989).....13

O'Shea v. Littleton, 414 U.S. 488 (1974) 20

Parker v. State, 292 Ark. 421, 731 S.W.2d 756 (1987).....15

Penry v. Lynaugh, 109 S. Ct. 2934 (1989) 18

Proffitt v. Florida, 428 U.S. 242 (1976) 13

Pulley v. Harris, 465 U.S. 37 (1984).....8

Roberts v. Louisiana, 428 U.S. 325 (1976) 13

Ruiz and Denton, 280 Ark. 190, 655 S.W.2d 441 (1983).....21

Simmons v. State, 298 Ark. 193, 766 S.W.2d 422 6

Simmons v. State, 298 Ark. 255, 766 S.W.2d 423 6

Singleton v. Wulff, 428 U.S. 106 (1976) 20

Spaziano v. Florida, 468 U.S. 447 (1984).....8

Stanford v. Kentucky, 109 S. Ct. 2969 (1989) 18

Tison v. Arizona, 481 U.S. 137 (1987) 18

Trop v. Dulles, 356 U.S. 86 (1958) 18

Valley Forge Christian College v. Americans United, 454 U.S. 464 (1982) 20

Whitmore v. State, 296 Ark. 308, 756 S.W.2d 890 (1988).....20

Page

Whitmore v. State, 299 Ark. 55, 771 S.W.2d 266 (1988) 20

Woodson v. North Carolina, 428 U.S. 280 (1976) 13

Zant v. Stephens, 462 U.S. 862 (1983) 12

UNITED STATES CONSTITUTION PROVISIONS AND ARKANSAS STATUTES

Ark. Code Ann. §5-4-601 (1987) 15

Ark. Code Ann. §5-4-602(3) 16

Ark. Code Ann. §5-4-603(a) 16

Ark. Code Ann. §5-4-604 16

Ark. Code Ann. §5-4-605 16

Ark. Code Ann. §5-4-608 16

Article III, §2 of the United States Constitution 2

Eighth Amendment to the United States Constitution ... 2

LAW REVIEW ARTICLES AND TREATISES

Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 Harv. L. Rev. 297 (1979) 23

Carter, *Maintaining Systemic Integrity in Capital Cases: the Use of Court-Appointed Counsel to Present Mitigating Evidence when the Defendant Advocates Death*, 55 Tenn. L. Rev. 95 (1987) 13

Dix, *Appellate Review of the Decision to Impose Death*, 68 Geo. L. J. 97 (1979) 13

Page

Goodpaster, *Judicial Review of Death Sentences*, 74 Jour. of Crim. L. and Criminology 786 (1983) ... 13

Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 Wisc. L. Rev. 37, 47, 54 (1984) 23

Pascucci, *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 Cornell L. Rev. 1129 (1984) 13

Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L. Rev. 881 (1983) 23

U.S. Dept. of Justice, Bureau of Justice Statistics, Bull., *Capital Punishment, 1987* at 5 (July 1988) 13

13 Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction* §3135.4—.6 (2d ed. 1984) ... 20

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OCTOBER TERM, 1988

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JONAS H. WHITMORE, INDIVIDUALLY
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RONALD GENE SIMMONS ..... *Petitioner*

VS.

STATE OF ARKANSAS ..... *Respondent*

RONALD GENE SIMMONS, SR. ..... *Respondent*

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT THE STATE OF ARKANSAS

JURISDICTION

This Court has no jurisdiction to enter a judgment in favor of petitioner Whitmore because Whitmore cannot satisfy the "case or controversy" requirement of Article III, §2 of the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides in pertinent part:

"[n]or cruel and unusual punishment inflicted."

Article III, §2 of the United States Constitution provides in pertinent part:

"[t]he judicial power shall extend to all cases, in law and equity, arising under this Constitution, . . ."

STATEMENT OF THE CASE

On December 28, 1987, Ronald Gene Simmons went on a murderous rampage in the town of Russellville, Arkansas. Within approximately 30 minutes at four different locations in Russellville, Simmons shot at six people with a .22 caliber pistol. Of the six intended victims, Simmons actually shot five, of whom two died as a result of their wounds. After Russellville Police Officers arrested Simmons, the Pope County Sheriff's Department searched Simmons' house, located at Dover, Arkansas, on the afternoon of December 28, 1987, and continued to search the next day, December 29, 1987. In the course of this search, the Deputy Sheriffs discovered bodies of fourteen members of Simmons' family. All had been murdered. Five of the victims were found in Simmons' house. Seven were buried in a shallow grave near the house. Two victims, infants, were found in the trunks of two junk automobiles located near the house.

On the basis of all these killings, the State of Arkansas filed two sets of criminal charges against Simmons. Simmons was tried for the Russellville crimes in May of 1988 in Franklin County Circuit Court (hereinafter *Simmons* I). Subsequently, in February of 1989, Simmons was tried in Johnson County Circuit Court for the murders of the fourteen members of his family whose bodies were discovered on December 28-29 (hereinafter *Simmons* II). The result of both trials was the same. A jury found Simmons guilty of capital murder and sentenced him to die.

With respect to *Simmons* I, Simmons made known to the trial court that he did not wish to directly appeal to the Arkansas Supreme Court the validity of his conviction for capital murder. On May 16, 1988, the Franklin County Circuit Court heard expert testimony concerning Simmons' mental competence to make a voluntary waiver of his right to a direct

appeal to the Arkansas Supreme Court. After hearing this expert testimony, the trial court found that Simmons was sufficiently mentally competent to voluntarily waive his right to a direct appeal. The correctness of this finding of fact by the Franklin County Circuit Court was challenged by Rev. Louis Franz, who filed with the trial court a petition requesting permission to prosecute a direct appeal on Simmons' behalf to the Arkansas Supreme Court as Simmons' next friend. Reverend Franz had no connection to Simmons or to the crimes that were the subject of *Simmons* I. On December 17, 1988, the Franklin County Circuit Court held a second hearing in order to determine Simmons' mental competence to waive a direct appeal to the Arkansas Supreme Court. After hearing additional expert testimony at this hearing, the Franklin County Circuit Court found that Simmons was sufficiently mentally competent to waive his right to a direct appeal to the Arkansas Supreme Court.

Reverend Franz carried his fight to intervene in *Simmons* I on behalf of Simmons as next friend to the Arkansas Supreme Court. On June 20, 1988, at the request of Reverend Franz, the Arkansas Supreme Court stayed Simmons' execution and ordered Franz and the State to submit briefs addressing four issues: (1) whether there should be a mandatory direct appeal to the Arkansas Supreme Court in death penalty cases; (2) if such a direct appeal is not required by the Eighth Amendment of the United States Constitution or by Arkansas Rules of Criminal Procedure, whether the Arkansas Supreme Court should review Ronald Gene Simmons' right to waive a direct appeal to the Arkansas Supreme Court; (3) assuming that the Arkansas Supreme Court does decide to review Ronald Gene Simmons' waiver of his right to a direct appeal, whether Simmons was sufficiently mentally competent to make a voluntary waiver of his right to a direct appeal to the Arkansas Supreme Court; and (4) whether Reverend Franz had standing as next friend to assert Simmons' right to a direct appeal to the Arkansas

Supreme Court. *Franz v. State*, 296 Ark. 111, 751 S.W.2d 355 (1988). After reviewing the briefs submitted by the parties and transcripts of the two competency hearings that were held by the Franklin County Circuit Court, the Arkansas Supreme Court issued an opinion in which it held that Reverend Franz did not have standing to assert, as next friend, Simmons' right to a direct appeal to the Arkansas Supreme Court and that neither the Eighth Amendment to the United States Constitution nor any Arkansas case law or rule of procedure required that there *must* be a direct appeal in a case where a defendant has received the death penalty. *Franz v. State*, 296 Ark. 181, 754 S.W.2d 839 (1988). (J.A. 4-28).

After this loss at the Arkansas Supreme Court, Franz next tried the United States District Court for the Eastern District of Arkansas as a forum from which he could intervene in *Simmons* I to prosecute a direct appeal on Simmons' behalf to the Arkansas Supreme Court. The United States District Court for the Eastern District of Arkansas ordered yet additional briefs, had Simmons examined at the Medical Center for Federal Prisoners in Springfield, Missouri, and had an independent counsel prepare a lengthy report in order to advise Simmons as to whether there were any reversible errors that occurred in *Simmons* I, including ineffective assistance of trial counsel. The District Court eventually held that Simmons was sufficiently mentally competent to waive his right to a direct appeal to the Arkansas Supreme Court and, therefore, Reverend Franz had no standing as next friend to assert Simmons' right to a direct appeal. *Franz v. Lockhart*, 700 F.Supp. 1005 (E.D. Ark. 1988). In *Franz*, the District Court also held that the Eighth Amendment to the United States Constitution requires that there be at least one review by an appellate court before a state may impose on a defendant the penalty of death. Franz has appealed to the United States Eighth Circuit Court of Appeals the District Court's denial of his petition seeking a writ of habeas corpus as next friend of

Simmons. This appeal is now on the Eighth Circuit's docket as *Franz v. Lockhart*, No. 89-1485EA. The Eighth Circuit has stayed *Franz v. Lockhart* pending this Court's decision in the instant case.

With respect to *Simmons* II (the instant case), on March 1, 1989, the Johnson County Circuit Court held an evidentiary hearing in order to determine whether Simmons was sufficiently mentally competent to waive his right to a direct appeal to the Arkansas Supreme Court of his conviction of capital murder and death sentence imposed for murdering 14 members of his family. The Johnson County Circuit Court reviewed the information in its file from *Simmons* I concerning Simmons' mental competence, heard additional testimony from Simmons and then found that Simmons was sufficiently mentally competent in order to waive his right to a direct appeal. The Arkansas Supreme Court affirmed this finding of fact on March 10, 1989 in *Simmons v. State*, 298 Ark. 193, 766 S.W.2d 422. (J.A. 29-31). Three days later, on March 13, 1989, Jonas Whitmore, petitioner in the instant case, filed a motion to intervene in *Simmons* II with the Arkansas Supreme Court. (J.A. 32-33). In this motion to intervene, Whitmore asserted that he should be allowed to do so as Simmons' next friend and also in order to protect his own rights and those of other Arkansas death row inmates, present and future. The Arkansas Supreme Court denied Whitmore's motion to intervene on the same day in *Simmons v. State*, 298 Ark. 255, 766 S.W.2d 423. (J.A. 34).

At this point, the death sentence that Simmons had received in *Simmons* II was to be carried out on March 15, 1989. After the Arkansas Supreme Court denied his motion to intervene, Whitmore petitioned this Court, as next friend of Ronald Gene Simmons, to stay the March 15, 1989 execution. In an order dated March 15, 1989, this Court *did* stay the execution that had been set for March 15, 1989 and ordered that

the stay remain in effect pending Whitmore's filing of a petition seeking a writ of certiorari to the Arkansas Supreme Court. This Court granted Whitmore's petition for a writ of certiorari to review the Arkansas Supreme Court's denial of his petition to intervene on July 3, 1989.

SUMMARY OF THE ARGUMENT

With respect to the first issue presented in this case, whether the Eighth Amendment requires that Ronald Gene Simmons directly appeal his capital murder conviction and death sentence to the Arkansas Supreme Court, respondent the State of Arkansas asserts that the Eighth Amendment does not require such an appeal, given the structure of Arkansas' death penalty sentencing process. In several cases, this Court has held that there is no one correct procedure for the states to employ in capital punishment cases. *See, e.g., Spaziano v. Florida*, 468 U.S. 447, 464-65 (1984). When this Court considers the Eighth Amendment sufficiency of a state's capital punishment sentencing procedure, this Court considers the procedure as a whole. *Pulley v. Harris*, 465 U.S. 37, 45 (1984). The State of Arkansas respectfully submits that its capital punishment sentencing procedure, when considered as a distinct whole, satisfies the Eighth Amendment's requirement that death sentences be imposed in a manner that is not fundamentally arbitrary, capricious or freakishly random. The following features of Arkansas' death penalty sentencing procedure, when considered as a whole, satisfy the Eighth Amendment: (1) a defendant can be sentenced to death only by a jury; (2) death penalty cases in Arkansas are bifurcated into a guilt/innocence phase; (3) the State is limited in the sentencing phase to proof of eight statutory aggravating circumstances and, moreover, the State must abide by the rules of evidence in proving its aggravating circumstances; (4) these aggravating circumstances have been facially approved by this Court in *Gregg v. Georgia*, 428 U.S. 153 (1976); (5) in the sentencing phase of an Arkansas capital trial the defendant is allowed to introduce a very wide range of mitigating evidence and is not constrained by the rules of evidence in putting in his proof; (6) in order to impose the death sentence an Arkansas jury must unanimously find in writing that the State's aggravating circumstances exist beyond a reasonable doubt, that these

aggravating circumstances outweigh beyond a reasonable doubt any of the defendant's mitigating circumstances that are found to exist and the jury must decide that the aggravating circumstances justify a sentence of death beyond a reasonable doubt; and (7) Arkansas trial judges are ". . . vested with broad powers to check the arbitrary, capricious, wanton or freakish imposition of death sentences by a jury." *Collins v. State*, 261 Ark. 195, 206, 548 S.W.2d 106, 113, *cert. denied*, 464 U.S. 878, *reh. denied*, 434 U.S. 977 (1977).

Respondent the State of Arkansas respectfully submits that this Court should not reach the Eighth Amendment issue present in this case because Whitmore lacks standing to argue to this Court that the Eighth Amendment requires a direct appeal to the Arkansas Supreme Court of Ronald Gene Simmons' capital murder conviction and death sentence. Whitmore has no connection to Simmons but for the fact that he, like Simmons, is a citizen of the State of Arkansas and is also an inmate on Arkansas' death row. Whitmore lacks standing because he cannot satisfy the "case or controversy" jurisdiction requirement of Article III, §2 of the United States Constitution. Whitmore cannot satisfy the "case or controversy" requirement of Article III, §2 because he cannot show that he has personally suffered from some actual or threatened injury as a result of Arkansas' refusal to mandate a direct appeal by Ronald Gene Simmons of his capital murder conviction and death sentence to the Arkansas Supreme Court. Whitmore cannot show any actual or threatened injury because he has already had an unsuccessful direct appeal to the Arkansas Supreme Court of his own capital murder conviction and resulting death sentence. Whitmore's contentions that he will suffer if Simmons' case is not put into the pool of Arkansas death penalty cases that the Arkansas Supreme Court examines when it undertakes comparative review of death penalty cases is entirely speculative. Whitmore has not made any showing that there is even the remotest possibility that his own capital

murder conviction and death sentence will be reversed at any time in the future. Given that Whitmore has no standing to assert that Ronald Gene Simmons must directly appeal his capital murder conviction and death sentence to the Arkansas Supreme Court because he cannot satisfy the "case or controversy" requirement of Article III, §2, respondent the State of Arkansas respectfully submits that the instant case is identical to *Gilmore v. Utah*, 429 U.S. 1012 (1976) and should be controlled by *Gilmore*.

ARGUMENT

I.

WHETHER THE EIGHTH AMENDMENT'S BAN AGAINST CRUEL AND UNUSUAL PUNISHMENT REQUIRES MANDATORY APPELLATE REVIEW IN ALL CASES IN WHICH THE DEATH PENALTY IS IMPOSED.

According to petitioner Whitmore, the substantive issue presented in this case is whether the Eighth Amendment's prohibition against cruel and unusual punishment mandates a direct appeal of all capital murder convictions and resulting death sentences. Respondent the State of Arkansas, disagrees with Whitmore's framing of the Eighth Amendment issue. The Eighth Amendment issue presented in this case is not whether, as an abstract matter, the Eighth Amendment requires a direct appeal of all capital murder convictions and resulting death sentences. The Eighth Amendment issue, properly framed, is whether Arkansas' capital sentencing procedure is so deficient that a mandatory direct appeal to the Arkansas Supreme Court is necessary to prevent the arbitrary and capricious imposition of death sentences by Arkansas juries following Arkansas' capital sentencing procedure.

As this Court has repeatedly held, the core of the Eighth Amendment's limitation on the ability of a state to impose the penalty of death on a particular defendant is the Eighth Amendment's requirement that death sentences be imposed in a manner that is not arbitrary, capricious or freakishly random. *See, e.g., Franklin v. Lynaugh*, 108 S. Ct. 2320, 2331 (1988) (plurality opinion); *Maynard v. Cartwright*, 108 S. Ct. 1853, 1858-59 (1988); *Booth v. Maryland*, 482 U.S. 496, 502 (1987); and *California v. Brown*, 479 U.S. 538, 541 (1987). In order to determine whether a state's capital punishment sentencing process measures up to this Eighth Amendment

requirement, this Court reviews the capital sentencing procedure at issue as a distinct whole. In *Pulley v. Harris*, 465 U.S. 37 (1984) this Court held:

> [w]e do not intend to suggest that only the above-described procedures would be permissible under *Furman* or that any sentencing system constructed on these general lines would inevitably satisfy the concerns of *Furman*, for each distinct system must be examined on an individual basis. *Id.* at 45 (quoting *Gregg v. Georgia*, 428 U.S. 153, 195 [1976]).

If Arkansas' capital sentencing procedure is considered as a whole, then it is not *necessarily* violative of the Eighth Amendment because it lacks the feature of a mandatory direct appeal to the Arkansas Supreme Court. In addition, this Court held in *Pulley* that a capital punishment sentencing procedure is not violative of the Eighth Amendment if it produces on occasion "aberrational outcomes." Instead, this Court held that a particular capital sentencing procedure is violative of the Eighth Amendment if it suffers from such "systemic defects" that the system produces death penalties in a manner that is arbitrary, capricious or freakishly random. *Pulley* at 54. Moreover, this Court has repeatedly recognized that there can be "no perfect procedure for deciding in which cases governmental authority should be used to impose death." *Johnson v. Mississippi*, 108 S. Ct. 1981, 1986 (1988); *Pulley, supra* at 54; *Zant v. Stephens*, 462 U.S. 862, 884-85, 904 (1983) and *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion).

Is Arkansas' death penalty sentencing procedure such that without the feature of a mandatory direct appeal to the Arkansas Supreme Court the procedure allows death penalties to be imposed in the manner that is fundamentally arbitrary and capricious? Arkansas notes at the outset that this Court has repeatedly identified appellate review as an important component, for Eighth Amendment purposes, of a state's capital punishment sentencing process. In *Murray v. Giarratano*, 109 S. Ct. 2765, 2771 (1989) this Court held that ". . . direct appeal is the primary avenue for review of capital cases. . . ." *Id.* at 2771. In a number of cases this Court or a plurality of the Court has stated that appellate review is an important component of a State capital punishment sentencing process because such review serves as a safeguard against the arbitrary or capricious imposition of the death penalty. *Murray*, at 2777 n.11 (dissenting opinion); *McCleskey v. Kemp*, 481 U.S. 279, 303 (1987); *Zant v. Stephens*, 462 U.S. 862, 876 (1983); *Gregg v. Georgia*, 428 U.S. 153, 198, 204-06, 211 (1976); *Proffitt v. Florida*, 428 U.S. 242, 250-51, 253, 258-59 (1976); *Jurek v. Texas*, 428 U.S. 262, 269, 276 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976); and *Roberts v. Louisiana*, 428 U.S. 325, 335 (1976); *see also* Pascucci, *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 Cornell L. Rev. 1129, 1188-98 (1984); Goodpaster, *Judicial Review of Death Sentences*, 74 Jour. of Crim. L. and Criminology 786 (1983); and Dix, *Appellate Review of the Decision to Impose Death*, 68 Geo. L. J. 97, 106-09 (1979). Moreover, it is the case that almost all of the 37 states that have the death penalty have statutory provisions for mandatory review of a capital defendant's conviction of capital murder and also of his death sentence. *See* U.S. Dept. of Justice, Bureau of Justice Statistics, Bull., *Capital Punishment 1987* at 5 (July 1988) and Carter, *Maintaining Systemic Integrity in Capital Cases: the Use of Court-Appointed Counsel to Present Mitigating Evidence when the Defendant Advocates Death*, 55 Tenn. L. Rev. 95, 114-16 (1987). The two lower courts that have specifically considered whether Arkansas' capital punishment sentencing process violates the Eighth Amendment because it lacks the feature of the mandatory appeal have disagreed. In *Collins v. State*, 261 Ark. 195, 204-11, 548 S.W.2d 106, 111-13, *cert. denied*, 434 U.S. 878, *reh. denied*, 434 U.S. 977 (1977) and again in *Franz v. State*, 296 Ark. 181, 186-88, 754 S.W.2d 839,

842-43 (1988) (*Simmons* I) the Arkansas Supreme Court held that the absence of a mandatory direct appeal was not a "make or break" feature of Arkansas' death penalty sentencing procedure. In so holding, the Arkansas Supreme Court relied primarily on this Court's decision in *Gilmore v. Utah*, 429 U.S. 1012 (1976). In both these cases a majority of the Arkansas Supreme Court held:

> [t]he idea that in *Gregg*, *Proffitt*, and *Jurek*, the United States Supreme Court has held that there must be a mandatory or automatic appeal from the imposition of the death penalty by a state trial court seems to have crumbled with the recent actions of the court in *Gilmore v. State of Utah*, 429 U.S. 1012, 97 S. Ct. 436, 50 L.Ed.2d 632 (1976), in which, on December 13, 1976, that court found that Gary Mark Gilmore, who had been sentenced to death, made a knowing and intelligent waiver of any and all federal rights he might have had. In a concurring opinion by the Chief Justice and Mr. Justice Powell, it is clearly pointed out that Gilmore had waived his right of appeal under state law, and the history of that waiver is recited. True enough, the order of the United States Supreme Court (White, Brennan, Marshall and Blackmun dissenting) does not specifically refer to this waiver. It does, however, state:
>
> > ***that the State's determinations of his competence knowingly and intelligently to waive any and all such rights were firmly grounded.
>
> If the Constitution of the United States requires that a state provide a mandatory appeal in such cases, we do not see how there can be a knowing and intelligent waiver of "any and all federal rights" when there has been no appeal from the state trial court's judgment imposing the death sentence. In any event, the Stewart plurality has said

> that it had no intention to suggest that the procedures approved in *Gregg* would be the only ones permissible under *Furman* or that a system constructed on these general lines would inevitably satisfy *Furman;* but that each system must be examined on an individual basis. *Gregg v. Georgia, supra. Collins* at 205-06, 548 S.W.2d at 112.

The United States District Court for the Eastern District of Arkansas reached the opposite conclusion in *Franz v. Lockhart*, 700 F.Supp. 1005, 1012-24 (E.D. Ark 1988) (*Simmons* I).

In order for this Court to evaluate the Eighth Amendment sufficiency of Arkansas' capital punishment sentencing procedure, the Court should consider the several components of the process. Arkansas' death penalty sentencing procedure is set forth in Ark. Code Ann. §§5-4-601—08 (1987). Aside from the absence of a mandatory appeal, Arkansas' death penalty sentencing procedure is virtually identical to the state procedures that were approved by this Court in *Gregg v. Georgia*, 428 U.S. 153 (1976) and *Proffitt v. Florida*, 428 U.S. 242 (1976).[1] Study of *Collins, supra* and Ark. Code Ann. §§5-4-601—08 reveals the following features of Arkansas' death penalty sentencing procedure that insure that death sentences will not be imposed in Arkansas in a manner that is fundamentally

[1] A defendant sentenced to death in Arkansas may directly appeal his capital murder conviction and death sentence to the Arkansas Supreme Court if he chooses to do so. Pursuant to Arkansas Rule of Criminal Procedure 36.24, Arkansas Supreme Court Rule 11(f) and Ark. Code Ann. §16-91-113(a) (1987), when a condemned defendant appeals his capital murder conviction and sentence to the Arkansas Supreme Court the court will review all of the trial court's rulings that were adverse to the defendant, whether or not the defendant advances the adverse rulings as an issue on appeal. This comprehensive review by the Arkansas Supreme Court is not, however, a review for plain error. *See Parker v. State*, 292 Ark. 421, 436, 731 S.W.2d 756, 764 (1987) and *Fretwell v. State*, 289 Ark. 91, 98, 708 S.W.2d 630, 634 (1986).

arbitrary, capricious or freakishly random. Initially, Arkansas notes that defendants in Arkansas criminal trial courts cannot receive the death penalty unless they are tried and sentenced by a jury. (Ark. Code Ann. §5-4-608). Moreover, the capital defendant's jury trial is bifurcated into a guilt/innocence phase that is held prior to a separate sentencing phase. [Ark. Code Ann. §5-4-602(3)]. In this sentencing phase the jury must unanimously make three findings of fact, in writing: (1) the jury must find that at least one of eight statutory aggravating circumstances exists beyond a reasonable doubt; (2) the jury must find that the aggravating circumstance or circumstances outweigh beyond a reasonable doubt *all* mitigating circumstances found to exist; and (3) the jury must find that the aggravating circumstance or circumstances justify a sentence of death beyond a reasonable doubt. [Ark. Code Ann. §5-4-603~~(a)~~)]. This weighing of aggravating circumstances against mitigating circumstances is not required by the Eighth Amendment. *Zant v. Stephens*, 462 U.S. 862, 875-76 n.13 (1983). At this sentencing hearing the State is limited to proof of only the eight statutory aggravating circumstances (Ark. Code Ann. §5-4-604) and the State must comply with the rules of evidence in order to prove its aggravating circumstances [Ark. Code Ann. §5-4-602(4)]. The State's aggravating circumstances have been approved by this Court in *Gregg*, *supra* and *Proffitt*, *supra*. In contradistinction to the State, the capital defendant in Arkansas is permitted to offer to the jury a very wide range of evidence in mitigation and the defendant is not constrained by the rules of evidence in putting forth his case in mitigation [Ark. Code Ann. §5-4-602(4) and Ark. Code Ann. §5-4-605]. The defendant has no burden of proof to satisfy in establishing his mitigating circumstances. Most importantly, Arkansas trial judges have ". . . broad powers to check the arbitrary, capricious, wanton or freakish imposition of the death sentence by a jury." *Collins* at 206-10, 548 S.W.2d at 113-15. Arkansas respectfully submits that these features of this death penalty sentencing process, particularly its requirement that aggravating circumstances exist beyond a reasonable doubt,

that they outweigh beyond a reasonable doubt any evidence going to mitigation and that they justify a sentence of death beyond a reasonable doubt, when considered as a whole insure that defendants will not be sentenced to death in Arkansas in a manner that is fundamentally arbitrary, capricious or freakishly random. These features of Arkansas' death penalty sentencing process considered as a whole ". . . are a far cry from the major systemic defects identified in *Furman*." *Pulley v. Harris* at 54.

Arkansas acknowledges that the feature of a mandatory direct appeal would provide an additional measure of reliability with respect to the imposition of death sentences only on those defendants who truly deserve to die as punishment for having committed the offense of murder. However, this Court has never interpreted the Eighth Amendment prohibition against cruel and unusual punishment to require meticulous exactitude in the imposition of the death penalty. *Pulley v. Harris* at 54. Since its landmark decision in *Furman v. Georgia*, 408 U.S. 238 (1972) this Court had interpreted the Eighth Amendment's prohibition against cruel and unusual punishment to require only that death sentences be imposed in a manner that is not fundamentally arbitrary, capricious or freakishly random. The features of Arkansas' death penalty sentencing procedure noted above insure that Arkansas juries will impose death sentences, when they choose to do so, in a manner that meets the Eighth Amendment's standard. It is true that most of the other states that have a death penalty provision do have some sort of mandatory appellate review. However, this Court has held that the Eighth Amendment *does not* require absolute symmetry among the states with respect to their death penalty procedures. *See Spaziano v. Florida*, 468 U.S. 447, 464 (1984).

In *Spaziano* this Court held that the Eighth Amendment does not forbid a judge from overriding a jury's recom-

mendation of a sentence of life imprisonment and sentencing a defendant in a capital case to death. In reaching this decision in *Spaziano* this Court held:

> [t]he fact that a majority of jurisdictions have adopted a different practice, however, does not establish that contemporary standards of decency are offended by the jury override. The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws. *Id.* at 464.

It is true that this Court has frequently made use of ". . . evolving standards of decency that mark the progress of a maturing society" [*Trop v. Dulles*, 356 U.S. 86, 101 (1958)] to determine whether a particular death sentence imposed on a defendant was violative of the Eighth Amendment. Furthermore, it is true that this Court determines the content of these "evolving standards of decency" by considering the content of state statutes. *Penry v. Lynaugh*, 109 S. Ct. 2934, 2953 (1989) and *Stanford v. Kentucky*, 109 S. Ct. 2969, 2974-77, 2982 (1989). Examination of the cases in which this Court has expressly made use of the "evolving standards" analysis to determine Eighth Amendment issues demonstrates that the "evolving standards" analysis is employed to determine whether the death penalty is a proportional punishment for certain kinds of criminal offenses or a proportional punishment for certain classes of defendants. *See, e.g., Tison v. Arizona*, 481 U.S. 137, 152-55 (1987) (Eighth Amendment does not forbid imposition of death on felony murderers who do not actually kill the victim, but act with reckless indifference to human life in the course of a felony in which someone is killed); *Ford v. Wainwright*, 477 U.S. 399, 406-09 (1986) (Eighth Amendment forbids imposition of the death penalty on inmates who become insane while on death row); and *Coker v. Georgia*, 433 U.S. 584, 593-97 (1977) (plurality opinion) (Eighth Amendment forbids imposition of the death penalty for the criminal offense of rape). As this Court's holding in *Spaziano* indicates, the *procedure* that a state uses to impose the death penalty, as opposed to the *substance* of the offense for which the death penalty is imposed or the kind of defendant on which the death penalty is imposed, is not violative of the Eighth Amendment mercly because the procedure is not followed in majority of states that have the death penalty.

II.

WHETHER PETITIONER WHITMORE HAS STANDING TO ASSERT THE CONSTITUTIONAL RIGHTS OF THE GENUINE PARTY AT INTEREST, RONALD GENE SIMMONS, AFTER SIMMONS HAS MADE A KNOWING AND INTELLIGENT DECISION TO WAIVE ASSERTION OF HIS OWN RIGHTS.

Petitioner Whitmore asserts that he should have standing to argue that the Eighth Amendment requires that there be a direct appeal of Ronald Gene Simmons' capital murder conviction and death sentence to the Arkansas Supreme Court. Respondent the State of Arkansas respectfully submits that Whitmore has no standing to assert this claim. Whitmore has no such standing because he cannot satisfy the "case or controversy" requirement of Article III, §2 of the United States Constitution.

In his brief Whitmore fails to demonstrate that he has any direct connection to Simmons or to Simmons' conviction and sentence of death except for the fact that Whitmore, like Simmons, is a citizen of the State of Arkansas and is an inmate on Arkansas' death row. This Court has repeatedly held that third parties, not otherwise connected with a particular legal controversy, who step forward to claim the right to assert the legal rights of genuine parties at interest have no standing to

do so. This Court has consistently held that "champions" such as Whitmore lack standing to assert the rights of genuine parties at interest because they cannot satisfy the "case or controversy" requirement of Article III, §2 of the United States Constitution. This Court has consistently held that a would-be plaintiff has standing to vindicate the constitutional rights of genuine parties at interest if: (1) the would-be plaintiff shows that he has personally suffered some actual or threatened injury as a result of the allegedly illegal conduct of the defendant; (2) the would-be plaintiff must show that the injury fairly can be traced to the challenged conduct of the defendant; and (3) the would-be plaintiff must show that the injury is likely to be redressed by a favorable decision. *See Caplin and Drysdale v. United States*, 109 S. Ct. 2646, 2651 n.3 (1989); *Allen v. Wright*, 468 U.S. 737, 750-52 (1984); *Valley Forge Christian College v. Americans United*, 454 U.S. 464, 472-6 (1982); *Singleton v. Wulff*, 428 U.S. 106, 112 (1976); and *O'Shea v. Littleton*, 414 U.S. 488, 493-4 (1974); *see also* 13 Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction* §3531.4—.6 (2d ed. 1984).

In his brief Whitmore fails to explain how it is that *he* will suffer some *actual* injury if Simmons does not challenge the validity of his capital murder conviction and death sentence by filing a direct appeal with the Arkansas Supreme Court. In truth, Whitmore cannot do so. Whitmore *has had* a direct appeal of *his* capital murder conviction and death sentence. *Whitmore v. State*, 296 Ark. 308, 756 S.W.2d 890 (1988). Moreover, Whitmore has received post-conviction review from the Arkansas Supreme Court. *Whitmore v. State*, 299 Ark. 55, 771 S.W.2d 266 (1989). Given that the Arkansas Supreme Court has reviewed Whitmore's capital murder conviction and death sentence on direct appeal and again on post-conviction review, any constitutional defect in Arkansas' death penalty sentencing procedure that exists because of the absence of a mandatory direct appeal to the Arkansas Supreme Court will have no actual effect on Whitmore.

In his brief Whitmore seems to allege that the capital murder that he committed will not seem so bad, by way of comparative review by the Arkansas Supreme Court, to the murders that Simmons committed. According to Whitmore, this fact is sufficient to actually injure him if the Arkansas Supreme Court does not review Simmons' capital murder conviction and death sentence because the Arkansas Supreme Court ordinarily does conduct comparative review of death sentences.[2] This assertion of an actual injury by Whitmore is entirely speculative. Whitmore's argument in this regard depends upon his capital murder conviction and death sentence, which the Arkansas Supreme Court has already affirmed, being reversed and remanded at some indefinite period in the future by some state or federal court. Whitmore has completely failed to allege in his brief that there is even a *remote* possibility that his own capital murder conviction and death sentence will be reversed at any time in the future. It is only if Whitmore's sentence and conviction are reversed that he would be able to minimize the reprehensibility of the murder that he committed by comparing it to the murders that Simmons committed. Until Whitmore can demonstrate some possibility that his conviction or sentence could be reversed and that he could face the death penalty a second time, his "compared-to-Simmons-I-don't-look-so-bad" argument is too speculative to warrant the conclusion that Whitmore will suffer some actual injury if the Arkansas Supreme Court does not conduct a direct review of Simmons' capital murder

[2]The Arkansas Supreme Court has committed itself to comparative review of death sentences imposed by Arkansas juries in order to make certain that each death penalty imposed by an Arkansas jury was not the product of arbitrariness or capriciousness. *See Ruiz v. State*, 280 Ark. 190, 655 S.W.2d 441 (1983). In determining that the death penalty was a proportional punishment for the murder that Whitmore committed, the Arkansas Supreme Court took note of the fact that Whitmore, in the course of a robbery, stabbed his victim ten times, cut her throat and carved an "X" mark on the side of her face. *Whitmore, supra* at 317, 756 S.W.2d at 895.

conviction and death sentence. Not only is Whitmore's "compared-to-Simmons-I-don't-look-so-bad" argument too speculative to serve as an actual injury to Whitmore, but it also proves too much as a logical matter. If Whitmore has standing to argue that Simmons' case should be in the pool of Arkansas death row cases for comparative review purposes, does Whitmore also have standing to intervene in the post-conviction efforts of other death row inmates with "more" heinous murders than his in order to resist their challenges to their capital murder convictions and death sentences? Would Whitmore have standing to intervene to assist death row inmates with "marginally" heinous murders to their credit in order to help them remove themselves from death row? Surely Whitmore does not have standing to intervene in post-conviction proceedings brought by Arkansas death row inmates in order to further his own interests by keeping the "more" heinous murderers on death row and by assisting the "less" heinous murderers to exit Arkansas' death row by attacking their capital murder convictions and sentences in post-conviction proceedings.

Whitmore could evade the Article III bar to his championing of Simmons' right to a direct appeal if Whitmore could demonstrate that he was Simmons' next friend. After reading Whitmore's brief, it appears to respondent the State of Arkansas that Whitmore has abandoned any effort to persuade this Court that he is the next friend, or should be, of Ronald Gene Simmons.

Whitmore attempts to evade the Article III bar to his lack of standing by arguing that there should be some sort of generalized "public interest" exception in cases such as the instant case where vindication of Eighth Amendment values in death penalty cases is at stake. This argument overlooks the Article III basis of standing. This Court has squarely held that it has no authority to, of itself, ignore the Article III, §2 "case or

controversy" limitation on its jurisdiction in the name of "public interest." *Allen v. Wright, supra* and *Gilmore v. Utah*, 429 U.S. 1012, *reh. denied*, 429 U.S. 1030 (1976); *see also* Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 Wisc. L. Rev. 37, 47, 54 (1984) and Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L. Rev. 881 (1983). Even in death penalty cases, this Court recognizes the Article III, §2 "case or controversy" limitation on its jurisdiction. *Gilmore, supra; see also Valley Forge Christian College, supra* at 489-90 n.26 ("[w]ere we to recognize standing premised on an 'injury' consisting solely of an alleged violation of a 'personal constitutional right' to a government that does not establish religion" *id.* at 265, "a principled consistency would dictate recognition of respondents' standing to challenge execution of every capital sentence on the basis of a personal right to a government that does not impose cruel and unusual punishment. . . .") and Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 Harv. L. Rev. 297, 312-13 (1979) (Prof. Brilmayer observes that if *Gilmore* had founded standing on "societal interest," then "the standing doctrine would have to fall."). In this respect, the instant case is identical to *Gilmore* and should be controlled by it.

CONCLUSION

Respondent the State of Arkansas, respectfully requests that this Honorable Court affirm the decision of the Arkansas Supreme Court in *Simmons v. State*, 298 Ark. 255, 766 S.W.2d 423 (1989).

Respectfully submitted,

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